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Supreme Court of the United States

OCTOBER TERM, 1965

NOS. ~~1309 and 1311~~ 132 & 133

LEMOIN CREE AND MARIE CREE, HIS WIFE, FREE-THOUGHT SOCIETY OF AMERICA, MADALYN E. MURRAY, TRUSTEE, AND LEDDIE MAYS, *Petitioners*,

v.

LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF MARYLAND; ALBERT W. WARD, DIRECTOR, STATE DEPARTMENT OF ASSESSMENTS AND TAXATION; ROBERT L. MAINEN, SUPERVISOR OF ASSESSMENTS OF BALTIMORE CITY; JOHN G. ARTHUR, DIRECTOR OF ASSESSMENTS FOR BALTIMORE CITY; THE MOST REVEREND LAWRENCE J. SHEHAN, ROMAN CATHOLIC ARCHBISHOP OF BALTIMORE, A CORPORATION SOLE; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND; UNITED CHRISTIAN CITIZENS, INCORPORATED; TEMPLE EMANUEL OF BALTIMORE AND MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENTS GOLDSTEIN, WARD, MAINEN, ARTHUR and THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND IN OPPOSITION

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QUESTION PRESENTED

In addition to the questions set forth by the petitioners in their respective petitions, the following question is presented by this case:

Whether the constitutional issues that petitioners attempt to raise present a justiciable case or controversy under the provisions of Section 2 of Article III of the constitution of the United States.

STATEMENT OF THE CASE

The suit below challenging Maryland's statutory tax exemption for houses of public worship was originally brought by the petitioners Murray and Mays in Circuit Court No. 2 of Baltimore City against the respondents the Comptroller of the Treasury of Maryland, the State Director of Assessments and Taxation, the Supervisor of Assessments of Baltimore City and the Director of Assessments for Baltimore City. Subsequently, petitioners Cree and Freethought Society of America intervened in the case as plaintiffs, and the respondents the Roman Catholic Archbishop of Baltimore, the Convention of the Protestant Episcopal Church of the Diocese of Maryland, the United Christian Citizens, Incorporated, Temple Emanuel of Baltimore, and the Maryland Synod of the Lutheran Church in America intervened as defendants.

The complaint, which was brought in petitioners' capacity as taxpayers, alleged that the exemption [Section 9 (4) of Article 81 of the Maryland Code] is invalid because: (1) it violates Articles 15, 23 and 36 of the Declaration of Rights of the Maryland Constitution (2) it violates the First Amendment to the United States Constitution, made applicable to the states by virtue of the Fourteenth Amendment, because it is a law respecting the establishment of a religion and a law prohibiting the free exercise thereof (3) it violates the Fourteenth Amendment to the United States Constitution because it deprives the petitioners and others similarly situated of property without due process of law. All of the respondents except Temple Emanuel

answered the complaint by denying the petitioners' claims of unconstitutionality and challenging the petitioners' standing to bring the action. Respondent Temple Emanuel's answer also denied that the exemption was unconstitutional, but did so on the explicit ground, not asserted by the other respondents, that the Free Exercise Clause of the First Amendment prohibits governmental taxation of buildings used as houses of worship.

At the hearing in the circuit court, evidence was introduced by the parties to show the actual scope of the exemption, as it is applied by the taxing authorities, and the amount of property affected thereby. It was shown by the testimony of the Director of Assessments for Baltimore City that the exemption is comprehensively applied by the taxing authorities to all buildings used for the purpose of teaching or contemplating the beliefs of a philosophical system, regardless of whether that philosophical system includes as one of its precepts a belief in the existence of a Supreme Being. It was also shown, however, that the exemption is strictly applied only to buildings in actual use for such purposes, and, for that reason, is not available for property held by religious or philosophical organizations for investment or other such uses. Documentary evidence revealed that in Baltimore City the exemption excludes from real property taxation about 2.8% of the total assessable real estate in the City, and accounts for about 13.5% of all of the property exempted from taxation under the various exemptions provided by law.

At the conclusion of the case, the trial court, in a lengthy and well-considered opinion, dismissed the complaint with prejudice, finding that the petitioners had standing to assert all of their federal and state constitutional conten-

tions, but holding that the exemption is not unconstitutional as claimed. With respect to the federal constitutional questions, the court concluded that the exemption is not in violation of the Due Process Clause of the Fourteenth Amendment because there exists a fairly discernible relationship between the exemption and the public good, and that it does not violate the Establishment Clause or the Free Exercise Clause of the First Amendment because it represents no more than a position of governmental neutrality toward religion, which the constitution does not forbid. In reaching its conclusion that the exemption is constitutional, the court found it unnecessary to consider respondent Temple Emanuel's argument that the Free Exercise Clause prohibits governmental taxation of houses of worship.

On appeal to the Court of Appeals of Maryland, the petitioners apparently abandoned their due process and free exercise contentions, for, in the case of petitioners Cree and Freethought Society of America, the only federal constitutional argument asserted was an establishment argument,* and in the case of petitioners Murray and Mays, the only federal constitutional contentions were an establishment argument and an equal protection argument, the latter being asserted by them for the first time.

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* Despite the fact that their brief in the Court of Appeals of Maryland contained no argument based on the Free Exercise Clause or the Due Process Clause, petitioners Cree and Freethought Society of America criticize the court for failing to have considered those provisions of the constitution in its opinion (petition, pp. 5-6, 13-14). This criticism is unjustified. Under the present rules of the Court of Appeals of Maryland, an argument not presented in a party's brief is considered to have been waived. See *Hyde v. State*, 228 Md. 209, 218, 179 A. 2d 421 (1962). Certainly in the light of this rule, the reasonableness of which is beyond question, petitioners Cree and Freethought Society of America must be regarded as having abandoned their free exercise and due process contentions in the Court of Appeals by not having presented them in their brief.

The Court of Appeals affirmed the trial court's decision dismissing the complaint, but on slightly different grounds than those relied upon by the trial court. The Court of Appeals held that the exemption does not violate the Establishment Clause because, despite its religious origins, the primary purpose and effect of the exemption is now secular in nature, and that it does not violate the Equal Protection Clause (a ground not presented to or considered by the trial court) because it is granted without discrimination to all organizations having or professing a belief concerning religion. Like the trial court, the Court of Appeals found it unnecessary in reaching its conclusion to consider respondent Temple Emanuel's free exercise contention.

Following the denial by the Court of Appeals of the motion of petitioners Cree and Freethought Society of America for a reargument, the petitioners filed in this Court their present petitions for a writ of certiorari.

ARGUMENT

It is respectfully submitted that this case presents no question that this Court should review on certiorari. The petitioners' constitutional attack upon Maryland's statutory tax exemption for houses of worship involves no federal question of any substance, and, in addition, presents no case or controversy reviewable by this Court under the provisions of Section 2 of Article III of the constitution of the United States.

A. *No Substantial Federal Question Is Presented*

Constitutional or statutory tax exemptions for houses of worship and other property of religious organizations exist in every state of the union and in the District of Columbia. Some of them date back to early colonial times while others, such as those of Alaska and Hawaii, are of very recent origin. See Note, *Constitutionality of Tax*

Benefits Accorded Religion, 49 Col. L. Rev. 968 (1949); Van Alstyne, *Tax Exemption of Church Property*, 20 Ohio St. L. J. 461 (1959); Kauper, *The Constitutionality of Tax Exemptions for Religious Activities* in "The Wall Between Church and State", 95, 110 (Oaks ed. 1963); Alaska Const., Art. IX, sec. 4; Rev. Laws of Hawaii 1955 (1961 Supp.) ch. 128-18. Throughout the long history of these exemptions in this country, not one has ever been set aside as invalid under the federal constitution, though the question has been raised from time to time in both the state and federal courts.

The state cases which have upheld such exemptions are: *City and County of San Francisco v. McGovern*, 152 P. 980, 989 (Cal. App., 1915); *Garrett Biblical Institute v. Elmhurst State Bank*, 163 N.E. 1, 4-5 (Ill., 1928); *State v. Alabama Educational Foundation*, 163 So. 527 (Ala., 1935); *Lundberg v. County of Alameda*, 298 P. 2d 1 (Cal., 1956), dismissed, 352 U.S. 921 (1956); *Fellowship of Humanity v. County of Alameda*, 315 P. 2d 394, 406-409 (Cal. App., 1957); *General Finance Corp. v. Archetto*, 176 A. 2d 73, 76-79 (R.I., 1961), dismissed, 369 U.S. 423 (1962); *Sisters of Holy Cross v. Town of Brookline*, 198 N.E. 2d 624, 633 (Mass., 1964). The federal cases are: *County of Santa Clara v. Southern Pac. R. Co.*, 18 F. 385, 400 (9th Cir., per Associate Justice Field, 1882), affirmed, 118 U.S. 394 (1886); Sovereign *Camp, W. O. W. v. Casados*, 21 F. Supp. 989 (D.C. N.M., 1938), affirmed, 305 U.S. 558 (1938); *United States v. Department of Revenue of State of Ill.*, 202 F. Supp. 757 (D.C. N.D., Ill., 1962), affirmed, 371 U.S. 21 (1962); *Swallow v. United States*, 325 F. 2d 97 (19th Cir., 1963), cert. denied, 371 U.S. 950 (1963), rehearing denied, 372 U.S. 925 (1963).

Although this Court has never in a full opinion addressed itself to the precise constitutional questions raised in the petitions, it has consistently indicated its accord with the view that no constitutional question of any importance is

presented in the exemption of property of religious organizations from taxation. For example, as recently as 1962 and 1956, it dismissed for want of a substantial federal question two appeals from state courts raising the identical questions presented here, *Lundberg v. County of Alameda,* 298 P. 2d 1 (Cal., 1956), dismissed, 352 U.S. 921 (1956) and *General Finance Corp. v. Archetto,* 175 A. 2d 73 (R.I., 1961), dismissed, 369 U.S. 423 (1962); and in 1963 it denied certiorari in the only case directly challenging (but without avail) the federal income tax exemption to religious institutions, *Swallow v. United States,* 325 F. 2d 97 (10th Cir., 1963), cert. denied, 371 U.S. 950 (1963), rehearing denied, 372 U.S. 925 (1963). Moreover, in *Abington School District v. Schempp,* 374 U.S. 203, 301 (1963), the recent case in which this Court declared unconstitutional the recitation of prayer and the reading of the Bible in the public schools, Mr. Justice Brennan's concurring opinion specifically recognized the validity of tax exemptions to religious groups.*

The foregoing are but reiterations of this Court's attitude throughout the years that tax exemptions for religious bodies are constitutionally inoffensive. On numerous occasions in the past the Court has had the opportunity to consider such exemptions in cases involving collateral questions, and it always has taken for granted their complete validity. See particularly *Gibbons v. District of*

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* As one of the reasons for upholding such exemptions, Mr. Justice Brennan pointed out that they have been given without discrimination to popular as well as unpopular sects, and in some instances to those organizations which do not profess a belief in God. The testimony of Mr. Arthur in this case, as described in the lower court's opinion (petitioners Murray and Mays' Appendix II, p. 31a), clearly shows that the Baltimore City practice is in accord with Mr. Justice Brennan's statement. The exemption in question is made available, without discrimination, to all sects contemplating the beliefs of a philosophical system, regardless of whether it involves a belief in the existence of a Supreme Being.

Columbia, 116 U.S. 404, 408 (1886); *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890); and *First Unitarian Church v. Los Angeles*, 357 U.S. 545 (1958). And, it has, on at least two occasions, affirmed without opinion decisions of lower federal courts specifically upholding tax exemptions for religious organizations. See *Sovereign Camp, W. O. W. v. Casados*, 21 F. Supp. 989 (D.C. N.M., 1938), affirmed, 305 U.S. 558 (1938) and *United States v. Department of Internal Revenue of State of Ill.*, 202 F. Supp. 757 (D.C. N.D., Ill., 1962), affirmed, 371 U.S. 21 (1962).

These authorities seem to leave little room for doubt that no federal question of substance is presented in a constitutional attack upon religious tax exemptions.

The main thrust of petitioners' attack upon the exemption is based upon the Establishment Clause of the First Amendment. They say in essence that the exemption amounts to nothing more than a grant of money by the state for the support of churches, which amounts to a constitutionally prohibited establishment of religion. There is nothing in this argument that has not already been rejected many times before. It has never been accepted by any court.

Although a tax exemption may have the same economic effect as a direct grant of money, the legal framework under which its functions is vastly different. At the heart of the legal basis for tax exemptions is the well-settled constitutional principle that the state is free to select its objects of taxation, and pursuant to this power, may altogether decline to tax certain kinds of property, so long as there is a reasonable basis for the exemption. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937); *Williams v. Baltimore*, 289 U.S. 36 (1933). Our tax laws, both state and federal, have been constructed on the theory that

legislatures may elect not to tax certain transactions or classes of property for reasons of policy which would be wholly insufficient to justify direct subsidies. Exemptions which the state legislatures, in their wisdom, grant to individuals or organizations in order to encourage or foster the public good long have been recognized as proper, and all that is required to sustain them is a showing of some fairly discernible relationship between the good of the person receiving the exemption and the good of the community. *Williams v. Baltimore, supra.*

In the exercise of this prerogative to exempt for the public good, the Maryland Legislature, like most other state assemblies, has exempted from taxation numerous kinds and types of organizations, including (in addition to houses of worship), hospitals, schools, charitable institutions, fraternal beneficiary associations, manufacturers, veterans' organizations, credit unions, historical societies, the Boy Scouts, volunteer fire departments, and that is just to name a few. (See Section 9 of Article 81 of the Maryland Code, set forth in petitioners Murray and Mays' Appendix III.) The fact that an exemption from taxation has been accorded to these various organizations certainly cannot mean that the legislature has "established" them as state instrumentalities, or adopted their purposes as state aims. Their selection for tax exempt status only represents a legislative judgment that, for the people in the community affected by these institutions, the encouragement of them will produce socially desirable results, which, in the long run, will be of benefit to all of the people of the state. Churches are but one of the many organizations selected by the legislature as an instrument capable of adding to the general public good, and to say as petitioners apparently contend, that their exemption "establishes" religions is tantamount to saying that the other exemptions must do like-

wise to the other organizations that enjoy them. This, of course, is not the case.

A prohibited establishment must involve active State promotion of religion, such as requiring prayer in the public schools or establishing a belief in God as a requirement to holding public office, *Abington School District v. Schempp*, 374 U.S. 203 (1963) and *Torcaso v. Watkins*, 367 U.S. 488 (1961). It does not include indirect and passive accommodations, such as nondiscriminatory tax exemptions, which infringe no religious freedoms. As Mr. Justices Goldberg, Brennan and Harlan pointed out in the *Schempp* case, *supra*, the First Amendment does not forbid the state to provide accommodations for those people in the community who, in the free exercise of their beliefs, desire to embrace religious doctrine. Indeed, the Free Exercise Clause of the First Amendment may be fairly said to require the states, in their pursuit of neutrality, to provide some accommodation in this area. It is contrary to the constitution for the state to impose certain forms of taxation upon the exercise of religion, *Follett v. McCormick*, 321 U.S. 573 (1944), and while we do not suggest that the state could not constitutionally place a property tax on churches and houses of worship, we do think that the legislature properly could have made and has made a factual judgment that true neutrality required it to refrain from the taxation of religious institutions. We think that the legislature could properly regard the exemption as a practical way to accord the churches and its members complete freedom of religion. It is, in effect, an aid to the private right of the individual to freely exercise the religious beliefs guaranteed him by the First Amendment.

In view of the foregoing, it seems clear that petitioners' constitutional claims fail to present any federal question of substance that this Court should review on certiorari.

B. *No Justiciable Case or Controversy Is Presented*

It is well settled that in order for a person to assert the invalidity of a statute on a First Amendment ground in this Court, he must show that he will sustain some direct injury to his own interests as a result of its enforcement, and not merely that he will suffer in some indefinite way in common with people generally. For that reason, a suit brought by a person in his capacity as a taxpayer will not present a justiciable case or controversy unless he shows some adverse impact on his own individual interests which is different than those of other taxpayers generally. *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Elliott v. White*, 23 F. 2d 997 (D.C. Cir., 1928); *Doremus v. Board of Education*, 342 U.S. 429 (1952); *Swallow v. United States*, 325 F. 2d 97, 98 (10th Cir., 1963), cert denied, 371 U.S. 950 (1963), rehearing denied, 372 U.S. 925 (1963).

The present suit was brought by petitioners in their capacity as taxpayers. They have shown no adverse impact on their individual rights as a result of the enforcement of the tax exemption under attack, and, for that reason, they present no justiciable case or controversy subject to review by this Court on certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that both petitions for a writ of certiorari be denied.

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